

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ELMORE NICHOLS, JR.,

Defendant-Appellant.

UNPUBLISHED
September 30, 2014

No. 316432
Wayne Circuit Court
LC No. 12-007351-FH

Before: OWENS, P.J., and JANSEN and O'CONNELL, JJ.

PER CURIAM.

Defendant appeals by right his jury-based conviction of first-degree home invasion with intent to commit criminal sexual conduct, MCL 750.110a(2).¹ We affirm.

Defendant's conviction arose from a break-in at the complainant's Lincoln Park home. The intruder assaulted the complainant, but ran out of the home when the complainant screamed. Officers responded to the area of complainant's house and saw a man matching the description of the intruder running down the street. The officers pursued the man and arrested him. The complainant later identified defendant as the intruder. The prosecutor charged defendant with first-degree home invasion with intent to commit third-degree criminal sexual conduct therein, MCL 750.110a, and with assault with intent to commit sexual penetration, MCL 750.520g.

During the jury instruction conference at the close of trial, the trial court informed counsel that the instruction on the home invasion charge would reference intent to commit criminal sexual conduct (CSC), but would not reference a degree of CSC. Both counsel agreed to this approach. The trial court prepared written instructions for the jurors, including the home invasion instruction. Regarding the CSC element of the home invasion charge, the written instruction stated: "Third, that when the defendant broke and entered the dwelling, he intended to commit criminal sexual conduct."

¹ Defendant was also convicted of receiving and concealing stolen property ("RCSP"), MCL 750.535(4)(a). Defendant does not challenge the RCSP conviction, which involved a different complainant.

Before giving the jury the final instructions, the trial court told the jurors to read along in their written instructions while the court verbally instructed them. When the court came to the home invasion charge, the court misstated the instruction, as follows: “third, the People have to establish that when the defendant broke and entered the building, he intended to commit criminal sexual conduct *involving penetration*” (emphasis added). At the time, no one questioned the discrepancy between the verbal instruction and the written instruction.

However, during deliberations, the jury sent a question to the court: “Is it possible to find guilty on count one (home invasion) but not guilty on count two (assault with intent to commit criminal sexual conduct involving penetration)? The third element on count one states ‘intended to commit criminal sexual conduct’ but does not say ‘involving penetration.’” The trial court discussed the question with counsel, and defense counsel stated that the jury should be advised that third degree criminal sexual conduct requires proof of penetration. After further discussion, the trial court called in the jury, reread their question aloud, and told them, “that’s exactly what your instruction that you took in says. Also, I think if you look at your verdict forms, they say you may mark one box on each of those on each of the sheets that you got. On each sheet you can mark a box.”

The jury deliberated for approximately forty more minutes, and then sent another question to the court: “What is the definition of criminal sexual conduct?” Approximately thirty-five minutes later, before the court had convened to answer the jury’s question, the jury informed the court that it had reached a verdict. The jury found defendant guilty on the charge of first-degree home invasion, and not guilty on the charge of assault with attempt to commit sexual penetration.

Defendant contends the trial court erred by giving the jury a verbal instruction that differed from the written instruction regarding the CSC element of home invasion. We review de novo the claim of instructional error, and we consider the instructions as a whole to determine whether an error occurred. *People v Kowalski*, 489 Mich 488, 501-502; 803 NW2d 200 (2011). Our Supreme Court has explained,

A criminal defendant has a constitutional right to have a jury determine his or her guilt from its consideration of every essential element of the charged offense. A defendant is thus entitled to have all the elements of the crime submitted to the jury in a charge which is neither erroneous nor misleading. Instructional errors that omit an element of an offense, or otherwise misinform the jury of an offense’s elements, do not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. Accordingly, an imperfect instruction is not grounds for setting aside a conviction if the instruction fairly presented the issues to be tried and adequately protected the defendant’s rights. [*Id.*, citations and quotations marks omitted.]

In this case, the record indicates that the instructions accurately apprised the jury of the elements of the home invasion charge. MCL 750.110a(2) provides:

A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, . . . is guilty of home invasion in the first

degree if at any time while the person is entering, present in, or exiting the dwelling . . . another person is lawfully present in the dwelling.

The trial court's written instruction correctly described the statutory element of intent to commit a felony, specifically, CSC. When the jury asked for clarification regarding the CSC element of the home invasion charge, the trial court's answer indicated that the jury should refer to their written instructions. The written instruction was sufficient to inform the jury that the prosecutor had the burden of proving that defendant intended to commit a criminal sexual assault when he broke into the complainant's home.

Defendant argues that reversal is required, and asserts that the trial court several times referenced sexual penetration as an element of the home invasion charge. The record contradicts defendant's argument. The court correctly described the element in the preliminary instruction given to the jurors, as follows: "Third, that when the defendant broke and entered the dwelling, he intended to commit criminal sexual conduct." Before and during voir dire, the trial court twice referenced "criminal sexual conduct third degree" regarding the home invasion charge, but did not reference penetration. Viewed as a whole, the jury instructions adequately informed the jurors of the prosecutor's burden of proof, and the jury's request for clarification resolved any confusion that might have arisen from the discrepancy between the verbal instructions and the written instructions. Accordingly, the discrepancy between the verbal instruction and the written instruction does not warrant reversal of defendant's conviction.

Affirmed.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Peter D. O'Connell